matter of public interest and that he had not been referred to any binding authority whereby a defence of fair comment simpliciter has been struck out and applying the dictum of Somervell L.J. in *Kemsley* v. *Foot*,[1] he refused the plaintiff's application. Dealing with O.19 r.27 and O.25 r.4 of the Rules of the Supreme Court, Somervell L.J. there said at page 39:

"They should be applied only in plain and obvious cases, and if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O.25 r.2."

The learned judge who rejected this application said:

"It is well established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case."

With respect to the learned judge, I think that it is well established that the defence of fair comment cannot be on any matter but must be on some matter of public interest, as contended by Mr. Thomas for the plaintiff and that the defence pleaded here is one of fair comment and not one of justification. This is clear from *Sutherland* v. *Stopes*.[2] There the plaintiff Mrs. Marie Stopes, the famous crusader for birth control, sued the defendant for libel. Viscount Finlay said in his speech at page 61:

"The defendant Sutherland pleaded: '(4) The said words in their natural meaning are true in substance and in fact.' Paragraph 5 of his defence raised the defence of public comment on matters of public interest, and paragraph 7 was as follows: '(7) In the alternative, if, which is denied, the said words bore or were understood to bear the meanings alleged, this defendant says that in so far as the said words consist of allegations of fact the same are true in substance and in fact and in so far as the said words consist of expressions of opinion the same are fair comments made in good faith and without malice upon such facts and upon such other matters as are referred to in paragraph 5 hereof, which said facts and other matters are matters of public interest.' The defence contained particulars of paragraph 4 and of paragraphs 5 and 7. These defences are to be taken to have been also raised by the second defendants.

It is clear that the truth of a libel affords a complete answer to civil proceedings. This defence is raised by a plea of justification on the ground that the words are true in substance and in fact. Such a plea in justification means that the libel is true not only in its allegations of fact but also in any comments made therein.

The defence of fair comment *on matters of public interest* is totally different. The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. If the facts are truly stated with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made. To raise this defence there must, of course, be a basis of fact on which the comment is made.

For a good many years past a practice has prevailed of raising this defence by what has been called the 'rolled up plea,' but it will be found that this term is a misnomer based on a misconception of the nature of the plea. Such a plea states that the allegations of fact in the libel are true, that they are of public interest, and that the comments upon them contained in the libel were fair. The allegation of truth is confined to the facts averred, and the averment as to the comments is not that they are true but only that they were made in good faith, and that they are fair and do not exceed the proper standard of comment upon such matters.

There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one [namely justification and fair comment], but it in fact raises only one defence, that being the defence of fair comment on *matters of public interest*. The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct."

As the defence pleaded here is one simply of fair comment and not one of fair comment on a matter of public interest, I would with respect agree with Mr. Thomas's contention that the learned judge should have allowed his application to strike out paragraph 3 of the defence.

This should not however prevent the defendants from applying to amend their defence before this matter comes to trial.

I would therefore allow this appeal, with costs here and in the court below. Deposit to be paid to appellant.

Lee Hun Hoe C.J. (Borneo) and **Wan Suleiman F.J.** concurred.

Appeal allowed.

Solicitors: *Thomas & Co.; Battenberg & Talma.*

SIM KIM ONG v. GOH PHAIK SOOI

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) December 31, 1975]

[Kuching — Federal Court Civil Appeal No. 96 of 1975]

Family Law — Whether High Court in Sarawak has jurisdiction to entertain a joint petition for divorce by mutual consent where the marriage is celebrated outside Sarawak — Sarawak Matrimonial Causes Ordinance (Cap. 94), s. 7.

In this case the parties were married before the Registrar of Marriage in Aberdeen, Scotland. After the marriage they returned and cohabited at various places in Sarawak. The learned trial judge held that the High Court had no jurisdiction to entertain the petition as the marriage was not celebrated before a civil authority in Sarawak. The appellant appealed.

Held, allowing the appeal: (1) the High Court has jurisdiction in divorce proceedings in respect of marriages celebrated outside Sarawak, provided the husband is domiciled in Sarawak or being of the Asiatic race has been habitually resident in Sarawak for two years or more;

(2) the court may therefore exercise its discretion in a proper case to dissolve a marriage by mutual consent even though the marriage was celebrated outside Sarawak;

(3) the case would be referred back to the High Court for hearing.

Cases referred to:-

(1) *Liu Kui Tze* v. *Lee Shak Lian* [1935] S.C.R. 85.

(2) *Nachimson* v. *Nachimson* [1930] P. 217.

(3) *R.* v. *Liverpool Justices* (1883) 11 Q.B.D. 638, 649.

(4) *Cox* v. *Hakes* (1890) 15 App. Cas. 506, 529.

(5) *Blackwood* v. *R.* (1882) 8 App. Cas. 92, 94.

(6) *F.* v. *F.* [1949] S.C.R. 7.

(7) *David Michael Chen* v. *Leonara Chen*, Sarawak High Court Matrimonial Cause No. M/6/55.

(8) *T.O. Thomas* v. *S.R. Thomas*, Sarawak High Court Matrimonial Cause No. M/7/62.

(9) *Salvesen or Von Lorang* v. *Administrator of Austrian Property* [1927] A.C. 641.

(10) *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517.

(11) *Lord Advocate* v. *Jaffrey* (1921) A.C. 146.
(12) *Attorney-General for Alberta* v. *Cook* (1926) A.C. 444.
(13) *Udny* v. *Udny* (1869) L.R. 1 S. & D. 441.
(14) *Ong Kim Yam* v. *Teo Guan Hia* (1959) S.C.R. 102.
(15) *Magor and St. Mellons Rural District Council* v. *Newport Corporation* (1952) A.C. 189, 191.
(16) *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* (1940) A.C. 1014, 1022.

FEDERAL COURT.

Ee Poh Teck for the petitioners.

Denis Ong (Assistant, Attorney-General, Sarawak) as *amicus curiae.*

Lee Hun Hoe C.J. (Borneo): This is an appeal against the decision of the learned judge in holding that the High Court has no jurisdiction to entertain a joint petition for divorce by mutual consent under the provisions of section 7 of the Matrimonial Causes Ordinance (Cap. 94) by reason of the fact that the marriage was celebrated outside Sarawak.

Briefly, the facts are that the petitioners were married in Aberdeen, Scotland on April 7, 1971 before the Registrar of Marriage for the District of Aberdeen. After the marriage they cohabited at various places and ultimately at No. 66, Kenyalang Park, Kuching. They have two girls aged 3 and 4 years. The wife is now residing in Penang. They presented a joint petition for mutual divorce under the provisions of Cap. 94. Since the marriage was celebrated outside Sarawak the learned judge was doubtful if the court had jurisdiction to hear such petition so he decided to hear argument. Mr. Ee Poh Teck appeared for the petitioners while Mr. Denis Ong, the State Assistant Attorney-General, appeared as *amicus curaie.*

Section 7 of Cap. 94 reads: —

"7. If two married persons mutually agree that their marriage should be dissolved and if either —

(a) the marriage was celebrated before a civil authority; or

(b) neither of the petitioners professes Christianity,

they may present a joint petition accordingly and the court may, if it thinks fit, dissolve such marriage on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of dissolution as it may deem fit."

In Sarawak the law relating to church, civil, Muslim, Chinese and Native customary marriages are regulated by Ordinances or customs. The Chinese Marriage Ordinance (Cap. 74) provides for the control and registration of marriages according to Chinese customary law. The other communities such as Muslims, Dayaks, and Orang Ulu are governed by their own system of personal law and marriages which are regulated by rules and customary law of their system of personal law.

It is not in dispute that the present marriage is a civil one. The law relating to religious and civil marriages celebrated in Sarawak is regulated by the Church and Civil Marriage Ordinance (Cap. 92). Section 1(2) makes it clear that the Ordinance shall not apply to marriages contracted according to the usages of Muslims, Hindus, Dayaks and other persons governed by their own laws or customs of marriage. Section 2 is an interpretation section. It defines "marriage" to mean "marriage as understood by English law, that is to say, the voluntary union for life, or until the marriage is dissolved by a court of competent jurisdiction, of one man with one woman to the exclusion of all others." The definition of "marriage" in section 2 of the Matrimonial Causes Ordinance (Cap. 94) is identical with the above definition. Section 2 of Cap. 92 defines "civil marriage" to mean "a marriage solemnized in the office of a Marriage Registrar in accordance with the provisions in that behalf hereinafter contained." And "Marriage Registrar" means "a person appointed under the provisions of this Ordinance for the purpose of conducting civil marriage." Further, section 5(2) provides that "A marriage before a civil authority shall be solemnized by a Marriage Registrar appointed under this Ordinance." Section 23 requires such marriage to be registered.

Mr. Ee contends that so long as the marriage comes within the definition of "marriage" in Cap. 94 then the Ordinance applies no matter where the marriage is celebrated. He submits that if the Ordinance is to cover only marriages celebrated in Sarawak the legislature could easily have inserted the words "in Sarawak." Finally, he submits that so long as the marriage is not repugnant to English law the Ordinance applies. On the other hand, Mr. Ong contends that both Cap. 92 and Cap. 94 must be read together. He submits that a marriage celebrated before a civil authority in section 7(a) of Cap. 94 must be construed as referring to a civil authority in Sarawak. Having considered the contentions of both counsel the learned judge came to the conclusion that Mr. Ong was right that under section 7(a) of Cap. 94 the marriage must be one celebrated before a civil authority in Sarawak. Since the marriage was celebrated outside Sarawak, he, therefore, held that the court had no jurisdiction to entertain the joint petition for mutual divorce. The petitioners appealed.

Divorce by mutual consent is recognised in Sarawak as part of the Chinese customary law. That the High Court has power to grant divorces to persons married according to Chinese custom is beyond question. The Court of Appeal made this very clear in *Liu Kui Tze* v. *Lee Shak Lian.*[1] There, Rogers J. refused to grant a decree for dissolution of marriage on a joint petition for mutual divorce on the ground that he had no jurisdiction to entertain the petition. The Court of Appeal, allowing the appeal traced the source of jurisdiction and held that the High Courts of Sarawak, North Borneo and Brunei had jurisdiction to grant divorces to persons married according to Chinese custom. The Chinese custom of dissolution of marriage by mutual consent has been extended to civil marriages in Sarawak by the Matrimonial Causes Ordinance (Cap. 94).

In making research as to the source of jurisdiction of the High Court in dissolution of marriage, it is necessary to look into various Orders made by the Rajah. There can be little doubt that the Rajah brought to Sarawak the first particle of English law. The first Court of Justice was opened by the Rajah on November 5, 1841. See Sarawak Gazette dated May 31, 1956. The first Rajah recorded in his *Journal* for

January 10, 1842 that: — "This day the first laws and regulations are to be promulgated in Sarawak." [*Jacob* "The Raja of Sarawak" (London 1876) Vol. I page 185. *Runciman* "The White Rajahs" page 68.] As law and order became established and the incidents of commerce and industry began to make themselves felt the need arose for a more comprehensive system of administration of justice. So, in 1870 the Second Rajah constituted a number of courts from which the present High Court in Borneo can trace its origin. "The Supreme Court" was mentioned in an Order in Supreme Council dated November 14, 1870. In 1871 there was a reference to "Debtors Courts;" in 1878 to "Court of Requests;" in 1880 to "Courts of Bankruptcy;" and in 1911 to "The Chinese Court" having jurisdiction over the Chinese population and dealing with matters relating to Chinese customary laws.

I need only refer to the Order dealing with the law relating to Civil Marriages dated May 1, 1871 which clearly showed that the Supreme Court had power to dissolve marriages. Sections 2 and 3 read: —

"2. That neither man nor woman after having had their names registered as husband and wife will be able to obtain a divorce unless adultery or harsh and unjust treatment be proved in the Supreme Court. Either party so offending will be liable to a fine not exceeding sixty dollars.

3. That either party separating without obtaining a divorce from the Supreme Court may be called on to pay damages or provide sufficient maintenance for children, or otherwise be mulct for bad conduct, according to the judgment of the court."

This was made even clearer when the Rajah by section 5 of an Order dealing with the law relating to marriages of Native Christian Converts dated September 26, 1892 provided "that such legal divorces can only be obtained in the Supreme Court at Kuching." This Order was superseded by another Order dated February 4, 1898 to include Asiatics and mixed races. However, the above provision was retained in the 1898 Order. So that in the 19th century the power of the Supreme Court to dissolve marriages already existed in Sarawak.

Section 2 of the Courts Order, 1922 established five courts, namely, the Supreme Court, Resident's Court, District Court, Magistrate's Court and the Native Court for the administration of civil and criminal law in Sarawak. Sections 19 to 27 dealt with the Resident's Court. Section 21 reads: —

"The said court shall ... excepting only that nothing herein contained shall be deemed to authorise any court to dissolve or annul a marriage lawfully solemnised in accordance with the Marriage Laws of Great Britain, Ireland and any British Colony, Possession or Protectorate other than the State of Sarawak."

The contention of the learned Assistant Attorney-General that by section 21 no court had jurisdiction to dissolve or annul a marriage celebrated in accordance with the marriage law of Great Britain, Ireland or any British Possession or Protectorate was based on a false premise. Section 21 referred to the Residents' Courts not to the Supreme Court. Under section 5(i) "the Supreme Court shall consist of two or more Supreme Court Judges to be appointed by the Rajah assisted by two or more native members of the Supreme Court of Sarawak." It is true that the 1922 Order mentioned its appellate jurisdiction only. Under Schedule II of the 1922 Order various earlier Orders were repealed but the two Orders dated May 1, 1871 and February 4, 1898 were not among the Orders repealed. The powers of the Supreme Court in Sarawak relating to matrimonial causes were to be found in Order No. M-6 (Matrimonial Causes) 1932. Section 3 of the said Order stated clearly that the Supreme Court was to have exclusive jurisdiction in divorce matters. Those powers existed even before 1922 by virtue of two Orders dated May 1, 1871 and February 4, 1898. So, the powers of the Supreme Court to dissolve marriages cannot be questioned. The Judges were also not legally qualified personnel until 1928 when the late Stirling Boyd (a barrister) was appointed as Judicial Commissioner. This title was later changed to Chief Justice. It was due to him that much of the confusion regarding the constitution of the court was gradually set right.

In 1928 Order No. L.4 was passed "to provide for a general rule in the absence of specific legislation." It had only two sections. Section 1 merely cited the short title. Section 2 provided that "the law of England is so far as it is not modified by Orders and other Enactments issued by His Highness the Rajah of Sarawak or with his authority, and in so far as it is applicable to Sarawak having regard to native customs and local conditions shall be the law of Sarawak." Along with the Order, notes for the guidance of officers in interpreting the Order were published. The next important piece of legislation was the Courts Order 1933 which repealed and re-enacted with amendments certain provisions of the Courts Order, 1922. The Chief Justice was mentioned in various sections of the Order. The Native Courts were excluded and a separate legislation was provided for native courts. Section 2 mentioned the Supreme Court and four classes of Magistrates' Courts. The 1933 Order set out the jurisdiction of the courts in civil and criminal matters clearly. The relevant part of section 9 of the 1933 Order reads:—

"9. In the exercise of their civil jurisdiction the powers of the courts, subject to any statutory provisions for the time being in force, shall be as follows:—

(a) The Supreme Court shall have jurisdiction in every suit...."

Clearly, the Supreme Court had been conferred with unlimited power and had unlimited jurisdiction in both civil and criminal matters.

Unlike the Resident's Court, the Supreme Court in the exercise of its power was not subject to statutory prohibition. That the Supreme Court had always had jurisdiction in all suits as the highest court in Sarawak was beyond doubt even in the 19th century. The 1933 Order merely confirmed this fact. English Courts accept as binding and conclusive a decree of dissolution of marriage pronounced by a competent foreign court which includes Scotland and Ireland, provided both parties thereto are domiciled within the jurisdiction of the court at the commencement of the proceeding. English courts recognise the validity of foreign judgments provided they do not run counter to English public policy, *e.g.* a divorce by mutual consent of a Russian marriage: *Nachimson* v. *Nachimson*.[2] In that case a man and a woman, both domiciled Russians, entered in Russia into a contract accepted by local law as one of marriage. The marriage could,

according to the same law, be dissolved by mutual consent or at the will of one of the parties, with merely formal conditions of official registration. The Court of Appeal held, reversing the decision of Hill J., that on an issue directed in a suit by the woman for judicial separation, that as the union so formed was of one man to one woman to the exclusion of all others, it constituted a valid marriage according to English law, notwithstanding that it could according to the local law, be dissolved as stated earlier.

Two matters — church and civil marriages on the one hand and matrimonial causes on the other hand — had been dealt with separately. The former was covered by Order No. M-2 (Marriages (Church and Civil)) 1930. The few amendments made had been made by the Law Revision Commissioner in 1947 and 1957. In the course of time Order No. M-2 (Marriages (Church and Civil)) 1930 and Order No. M-6 (Matrimonial Causes) 1932 became the Church and Civil Marriages Ordinance (Cap. 92) and Matrimonial Causes Ordinance (Cap. 94) respectively.

In 1964 Sarawak was *ceded* to the British and became a Colony. In 1947, in addition to other courts, two circuit courts were constituted, having jurisdiction throughout Sarawak, by the Circuit Courts Ordinance (No. 20 of 1947). Only legally qualified persons could be appointed Circuit Judges. The Circuit Courts were under the general control of the Chief Justice. The two Circuit Judges were Justice Digby and Justice Lascelles. The Courts Ordinance, 1951 repealed the Circuit Courts Ordinance. The jurisdiction of the Circuit Courts then passed to the High Courts constituted by the Sarawak, North Borneo and Brunei (Courts) Order in Council 1951. This was commonly known as the combined judiciary having jurisdiction over Sarawak, North Borneo (now Sabah) and Brunei. The said Order in Council 1951 established one superior court of record styled as the Supreme Court of Sarawak, North Borneo and Brunei and the Court of Appeal of Sarawak, North Borneo and Brunei. After Malaysia, the Superior Court ceased to exercise jurisdiction over Brunei. The jurisdiction and function of the High Court of Sarawak, North Borneo and Brunei were assumed by the High Court in Borneo which is a court exercising equal and co-ordinate jurisdiction as the High Court in Malaya. In the same way the appellate jurisdiction of the Court of Appeal of Sarawak, North Borneo and Brunei was absorbed by the Federal Court. Section 5(1)(b)(iii) of the Courts of Judicature Act, 1964 provides in no uncertain terms that the written laws in force in Malaysia on Malaysia Day are hereby amended by the substitution of the expression "High Court" wherever it occurs for the "Supreme Court."

Section 1(2) of Cap. 94 states clearly that the Ordinance shall not apply to marriages by Muslim law or custom, native law or custom, Chinese law or custom, Hindu law or custom, or other law or custom repugnant to English law as defined in section 2 for the purposes of the definition of the word "marriage." Under English law marriage means the voluntary union for life of one man with one woman to the exclusion of all others. This English concept of union of one man and one woman to the exclusion of all others has been imported into Sarawak. The implication is that Cap. 94 applies to marriages not repugnant to English law. Section 2 of the 1928 Order No. L4 mentioned earlier is also significant.

In this case the marriage was celebrated in Aberdeen, Scotland. The learned judge himself stated that he was prepared to accept that the marriage was one within the meaning of marriage under section 2 of Cap. 94. It could not be otherwise as the marriage was celebrated according to the English concept of marriage. It is also within the meaning of "marriage" under section 2 of Cap. 92. It seems to me that there is no point in repeating word for word the same definition of "marriage" in the two Ordinances if the two are to be read together. Also, each deals with different matter. Further, by reading section 1(2) and section 2 of Cap. 94 together the implication is clearly that the Ordinance applies to marriage according to English law. This explains why the legislature did not insert the words "in Sarawak" in section 7.

The learned judge considered that the words "civil authority" in section 7 of Cap. 94 should be given a restricted meaning. He construed, with respect, wrongly the provision "the marriage was celebrated before a civil authority" in section 7(a) of Cap. 94 to mean a marriage solemnised before a civil authority by a Marriage Registrar appointed under Cap. 92. He referred to passages of Bowen L.J. in *R.* v. *Liverpool Justices,*[3] Lord Herschell in *Cox* v. *Hakes*[4] and the Privy Council in *Blackwood* v. *R.*[5] in support of his construction. Therefore, considering the provisions of the two Ordinances together he came to the conclusion that the petitioners had failed to satisfy the court of one of the two conditions, namely, that the marriage was celebrated before a civil authority "in Sarawak." Accordingly, he held that the court had no jurisdiction to entertain the petition. If his interpretation is right it means that under Cap. 94 the court can dissolve marriages celebrated outside Sarawak in respect of all grounds except ground for mutual divorce. Before us the Assistant Attorney-General went even further to say that the High Court had no jurisdiction to dissolve any marriage celebrated outside Sarawak. This sweeping statement cannot be supported. For years the High Court has exercised jurisdiction in divorce matters.

I would like to go back to section 7 of Cap. 94. The object of the section is clearly to facilitate means of obtaining divorce easily so long as the spouses freely consent to divorce and proper provisions are made for the wife and children if any. The intention of the legislature is to be liberal rather than restrictive. The wide discretion given to the court under the Ordinance to dissolve marriages indicates that intention in no uncertain terms. Once the spouses agree to divorce they can present a joint petition and elect to proceed either under section 7(a) or 7(b). If they are not Christians they can proceed under either section 7(a) or 7(b). But, if both or one of them is a Christian then they can only proceed under 7(a). Now, if the parties, not being Christians had proceeded under 7(b) then the question of where the marriage was celebrated would not arise. This would produce an absurd result in that divorce could be obtained under one subsection without the necessity of proving where the marriage

was celebrated but not under another subsection. I do not think that is the intention of the legislature. In the matter of dissolution of marriage domicil is usually the deciding factor in determining the jurisdiction of the court rather than the venue of the marriage.

That the High Court in Sarawak has jurisdiction in divorce proceedings in respect of marriages celebrated outside Sarawak has never been questioned and can be traced to many cases which came before the court. I need only refer to a few. In *F.* v. *F.*[6] the court ordered a decree nisi to be made absolute in six months in respect of a marriage celebrated outside Sarawak. It is sufficient to quote the first paragraph of the judgment of Dr. Hedges C.J. (who incidentally was also the Law Revision Commissioner in 1947) when he said: —

"The parties were married in the Colony of Singapore by civil ceremony on December 28. 1937. The petitioner does not claim to be domiciled in Sarawak, and domicil is normally the foundation of divorce jurisdiction. Nevertheless by virtue of the proviso to section 4 of the Matrimonial Causes Ordinance the Supreme Court may grant a decree on the petition of either husband or wife, if the husband being wholly or partly of Asiatic race has been habitually resident in the Colony for two years or more. The petitioner is Eurasian and has been habitually resident here for more than the prescribed period."

Then there is the unreported case of *David Michael Chen* v. *Leonara Chen*[7] where the court granted a divorce in respect of a marriage celebrated according to the rites and ceremony of the Roman Catholic Church at Hong Kong on November 15, 1948. The next one is the unreported case of *T. O. Thomas* v. *S. R. Thomas.*[8] The parties were married in England. Originally, they presented a joint petition for divorce by mutual consent but the High Court struck out the petition on the ground that the respondent's signature was not witnessed by a magistrate as required by section 5(3) of Cap. 94. The jurisdiction of the High Court under section 7(a) of Cap. 94 was beyond doubt. Eventually, the petitioner filed another petition for divorce on the ground of desertion. As the respondent did not wish to contest the court granted the petitioner a decree of dissolution of marriage by making it absolute forthwith.

Viscount Haldane in *Salvesen or Von Lorang* v. *Administrator of Austrian Property*[9] stated at page 653: —

"For the marriage gives the husband and wife a new legal position from which flow both rights and obligations with regard to the rest of the public. The status so acquired may vary according to the laws of different communities. The disability of monastic celibacy, for example, or that of a minor, or that of consanguinity, may be binding by the law of one country so as to invalidate the married status, while not binding by that of another. When, therefore, it is necessary to determine what married status implies and how far rights or acts are affected by it, it is necessary to determine the law by which they are fixed. It may be going too far to assert that these are all recognised in this country as referable only to the law of the domicil. But, at least it is now established, since the decision in *Le Mesurier* v. *Le Mesurier;*[10] *Lord Advocate* v. *Jaffrey*[11] and *Attorney-General for Alberta* v. *Cook,*[12] that for a decree of dissolution of a marriage the court of the domicil is the true court of jurisdiction. That jurisdiction ought on principle to be regarded as exclusive."

In Sarawak the law relating to dissolution of marriage is contained in Cap. 94. There is no necessity to drag in Cap. 92 which is merely to make provision in the law relating to church and civil marriages celebrated in Sarawak. The High Court has exclusive jurisdiction to make a decree of divorce, nullity of marriage, judicial separation or restitution of conjugal rights. (Section 3). The draftsman must have in mind what Viscount Haldane said about the true court of jurisdiction in dissolution of marriage is the court of domicil. The law of domicil seems to be the true law to be applied to any alteration of the relations between husband and wife arising from their marriage. Thus, section 4 defines the extent of powers of the court to grant relief. It stipulates, *inter alia,* that nothing in this Ordinance shall authorise the High Court to exercise the power unless the husband is domiciled in Sarawak or both parties are resident in Sarawak at the time when the petition is presented. The Ordinance clearly seeks to protect local communities bearing in mind that it was enacted in 1932 when Sarawak was still under the Brooke regime. Thus, the court is also empowered to grant relief on a petition of: —

(a) either husband or wife, if the husband being wholly or partly of Asiatic race has been habitually resident in Sarawak for two years or more; or

(b) the wife, if the wife is of a race indigenous to Sarawak or would but for her marriage be domiciled in Sarawak or being wholly or partly of Asiatic race has been habitually resident in Sarawak for two years or more.

The question of domicil is not merely a matter of theoretical speculation but one of great practical importance. Domicil and not nationality determines in general jurisdiction as regards personal rights, e.g. legitimacy, sanity, capacity, marriage, divorce, succession, testacy and intestacy: *Udny* v. *Udny.*[13] Cap. 94 is unique and peculiar to Sarawak as it provides for divorce by mutual consent. The High Court in Sarawak has very wide discretion in matter of dissolution of marriage. It may grant a divorce on the petition of a person on the ground that circumstances have arisen which make it reasonable and just to dissolve the marriage (section 6(2)). It may also grant a divorce on ground that circumstances have arisen which in the opinion of the court make it reasonable and just that the marriage should be dissolved. (Section 6(3)(b)). Thus, in *Ong Kim Yam* v. *Teo Guan Hia*[14] the husband failed to prove desertion and the wife cruelty in her cross-petition. Briggs J. in the exercise of his discretion under section 6(3)(b) of Cap. 94 granted the parties a divorce after considering the interest of the children.

I think the real question is whether the High Court ought to exercise its discretion in dissolving a marriage by mutual consent of a marriage celebrated outside Sarawak on the facts of this case. The approach of the learned judge seems to be that the High Court is competent to dissolve marriage celebrated outside Sarawak on all grounds except on ground of mutual divorce. Unless the question of validity arises the true law to apply is that of domicil and not whether the marriage was celebrated outside Sarawak. Under section 4(b) of Cap. 94 it is stated clearly that nothing shall authorise the High Court "to make any decree of nullity of marriage in any case in which the marriage is void *ab initio* unless the marriage was celebrated *in Sarawak* or the husband is domiciled or both parties are resident in Sarawak at the time when the petition is presented." The implication is that the court can make a decree of divorce, judicial separation,

restitution of conjugal rights but not one of nullity *ab initio* in respect of marriage celebrated outside Sarawak unless the husband is domiciled in Sarawak or both husband and wife are resident in Sarawak at the time of presentation of a petition.

With respect, I think the learned judge was wrong to give a restricted interpretation to section 7 of Cap. 94. In construing a statute the court should not try to insert words into it thus restricting its meaning. The duty of the court is limited to interpreting the words used by the legislature. The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. Craies on Statute Law, 6th Edition, page 7 states: —

"In other words, the language of Acts of Parliament, and more especially of modern Acts must neither be extended beyond its natural and proper limit, in order to supply omissions or defects, nor strained to meet the justice of an individual case."

In this context I would like to refer to the *Magor and St. Mellons Rural District Council* v. *Newport Corporation*[15] where Lord Simonds made these observations: —

"The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited."

Furthermore, as I have said earlier the Ordinance shows that intention of the legislature is to be liberal rather than restrictive and to facilitate easy means of obtaining divorce. In *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[16] Viscount Simon L.C. offered this piece of advice in construing a statute which may give rise to two interpretations: —

"At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

In the light of the wide discretion given to the High Court to grant divorce on grounds not found in other jurisdiction it does not seem to be the intention of the legislature to restrict section 7 to a civil marriage celebrated in Sarawak. The legislature could have made it as clear by adding the words "in Sarawak" as it had done to section 4 in respect of nullity *ab initio*. There is nothing to prevent the court after hearing evidence from granting a divorce of a marriage celebrated outside Sarawak on the ground that circumstances have arisen which make it reasonable and just to dissolve the marriage in the exercise of its power under section 6(3)(b) as was done by Briggs J. in *Ong Kim Yam* v. *Teo Guan Hia*[14] so long as the wife and children are properly provided for. The court can exercise that discretion by granting divorce on that ground even if the court considers it ought not to dissolve a marriage by mutual consent.

For reasons given, I would allow the appeal with the direction that the joint petition be referred back to the High Court for hearing. There will be no order as to costs. Deposit to be refunded to appellant.

Suffian L.P. and **Wan Suleiman F.J.** concurred.

Appeal allowed.

Solicitors: *Ee Lim & Leong.*

S. SINGARAM v. FONG PECK MOI & ANOR.

[A.C.J. (Ibrahim J.) April 22, 1975]

[Muar — Civil Appeal No. 1 of 1974]

Practice and Procedure — Memorandum of Appeal filed and served out of time — Appeal dismissed with costs — Appellant by Notice of Motion applying for decision to be set aside — Whether court has power to set aside decision — Subordinate Courts Rules, 1950, O.39 r.3(2) — R.S.C. 1957, O.13 r.10, O.28 r.11, & O.59 r.2(1).

On August 27, 1973 the defendant in Segamat Magistrate's Court Civil Action No. 7 of 1972 filed a Notice of Appeal against the decision of the learned Magistrate. The notice that the appeal record was ready was served on the defendant on January 11, 1974, but the Memorandum of Appeal was filed and served only on January 29, 1974, after the expiry of the 14 days stipulated under O. 59 r. 2(1) of the Rules of the Supreme Court, 1957. The plaintiffs filed and served a Notice of Preliminary Objections on March 2, 1974 and a reply to that notice was filed and served by the defendant on March 7, 1974. On February 23, 1975, the court dismissed the appeal with costs on the ground that the Memorandum of Appeal was filed and served out of time. By Notice of Motion dated March 2, 1975, the defendant sought to set aside the said decision. Notice of Preliminary Objections in respect of the application was filed and served on March 20, 1975.

Held: (1) the decision made by the court was final and the court had no power to set it aside;

(2) Order 13 r.10 of the Rules of the Supreme Court, 1957 deals specifically with setting aside judgments entered pursuant to any of the preceding rules of O. 13 and could not be extended to this case, particularly when the issue had been vigorously argued before the decision was made;

(3) under Order 28 r. 11 only clerical mistakes or accidental omissions in judgments or orders may be corrected on motions or summons without an appeal.

[**Editorial Note:** This decision was affirmed on appeal to the Federal Court in Federal Court Civil Appeal No. 45 of 1975 on October 20, 1975.]

Cases referred to:-

(1) *Lim Chiam Neo* v. *Tan See Tiam* (1963) M.L.J. 145.

(2) *Natesan* v. *Goh Gok Hoon* [1968] 2 M.L.J. 3.

CIVIL SUIT.

D. A. Devadason for the appellant.

H. N. McLeod for the respondents.

Ibrahim J.: On August 27, 1973 the defendant in Segamat Magistrate's Court Civil Action No. 7 of 1972 filed a Notice of Appeal against the whole of the decision of the learned magistrate made on August 26, 1973 pursuant to the order dated June 26, 1973 made by Pawan Ahmad J. The notice that the appeal record was ready in Form 40 under O.39 r. 3(2) of the Subordinate Courts Rules, 1950 was served on defendant on January 11, 1974 but the Memorandum of Appeal was filed and served only on January 29, 1974 apparently after expiry of the 14 days stipulated under O.59 r. 2(1) of the Supreme Court Rules, 1957. Notice of Preliminary Objections was filed and served by plaintiffs on March 2, 1974 and one of the grounds of objection was that the Memorandum of Appeal was filed and served out of time. A reply to that notice was filed and served by defendant on March 7, 1974. On February 23, 1975 I dismissed the appeal with costs on the ground that the Memorandum of Appeal was filed and served out of time (see order at enclosure 18). Defendant had not appealed against that decision but by Notice of Motion (enclosure 15) dated March 2, 1975 had applied for it to be set aside "and that the